IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Governor Mark Sanford ..... Petitioner,

v.

South Carolina State Ethics Commission and
Herbert R. Hayden, Jr., in his official capacity as
Executive Director of the State Ethics Commission ..... Respondent.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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Argument Summary

Governor Sanford's petition should be dismissed for the following reasons:

- The petition is not ripe because (1) the investigation of Governor Sanford has not yet been completed; (2) no report about the investigation has been prepared; (3) no report has been provided to the Commissioners or to anyone else; (4) the Commission has not heard argument or ruled upon the Governor's motion to enjoin release of information to the General Assembly; and (5) the House of Representatives has not initiated impeachment proceedings.

- South Carolina Rule of Appellate Procedure 245(a) requires that Governor Sanford first should pursue his Motion to Enjoin Dissemination of Investigative Report and all Other Materials Related to These Proceedings before the Ethics Commission and, if denied that relief, seek review through the usual judicial procedures.

- Governor Sanford actually seeks injunctive relief, which he must pursue by presentation of his Motion to Enjoin Dissemination of Investigative Report and all Other Materials Related to These Proceedings that remains pending before the Ethics Commission.

- Alternatively, the Ethics Commission has no affirmative duty not to release information to the House of Representatives acting in an impeachment capacity, because the decision whether to release the report is not ministerial in nature, and because the Governor has no specific legal right precluding release of a report to the House of Representatives in this instance.

Factual and Procedural Background

A. Events that have not yet occurred in this case.

Because ripeness is a crucial consideration in this case, the most important things about this case are not the events that have occurred, but those that have not. Although the Ethics Commission has initiated an investigation of Governor Sanford, that investigation is ongoing and likely will not be completed before late October 2009. Affidavit of Herbert R. Hayden, Jr. ¶¶ 14-15 (attached as Exhibit A). Because the investigation has not been completed, no reports have been completed or presented to

the Commission. Aff. ¶ 16. The Commission also has not heard argument or ruled upon Governor Sanford's Motion to Enjoin Dissemination of Investigative Report and all Other Materials Related to These Proceedings ("Motion to Enjoin Dissemination") filed with the Commission on September 14, 2009. Aff. ¶¶ 22, 26-29. And, finally, the House of Representatives has not initiated impeachment proceedings and the Commission staff will not provide any report to the House of Representatives of its own initiative unless and until that occurs. Aff. ¶¶ 25, 28.

B. Events that have occurred in this case.

On August 18, 2009, the Ethics Commission initiated an investigation concerning Governor Mark Sanford pursuant to the Ethics, Government Accountability, and Campaign Reform Act of 1991, as amended (the "Ethics Act"). Aff. ¶ 14. On August 24, 2009, the Ethics Commission received a letter from Karl S. Bowers, Jr., confirming that Hall & Bowers, LLC, would be representing the Governor in the investigation and setting forth his understanding of the confidentiality waiver. Aff. ¶ 18. By letter dated August 27, 2009, the Executive Director responded to Mr. Bowers, explaining the ramifications of the confidentiality waiver. Aff. ¶ 19. The next day, August 28, 2009, the Governor wrote a letter to the Ethics Commission, waiving his right to confidentiality during this investigation. Aff. ¶ 20.

On September 8, 2009, Kevin A. Hall and Mr. Bowers met with the Executive Director regarding the ongoing investigation. Aff. ¶¶ 21-22. During that meeting, the Executive Director advised Mr. Hall and Mr. Bowers that "[t]hroughout the course of the investigation and prior to presenting a written report to the Commission, the Commission's investigators will notify [Governor Sanford's counsel] of any issue that

they believe may support a finding of probable cause and will offer [Governor Sanford] the opportunity to present evidence, facts, or arguments regarding such issues." Aff. ¶ 21. The Executive Director also advised that the Governor's "response will be included in any written report presented to the Commission." Aff. ¶ 21. This conversation was confirmed by Mr. Bowers by letter dated September 9, 2009. Aff. ¶ 21.

During the September 8, 2009 meeting, the Executive Director also advised Mr. Hall and Mr. Bowers that the "Commission will entertain a motion ... to prevent the disclosure of any written report of investigation to any person or entity other than the Commission or the Respondent, including but not limited to the General Assembly or any member or employee thereof." Aff. ¶ 22. Again, Mr. Bowers confirmed this statement in his letter dated September 9, 2009. Aff. ¶ 22. On September 11, 2009, an article entitled "*Sanford fears 'kangaroo court'*" authored by John O'Connor appeared in The State, quoting the Executive Director as saying "that once the House opens impeachment hearings, it becomes a prosecutorial body and can have access to Ethics Commission reports." Petition, Exh. E.

On September 14, 2009, six days after the meeting with the Executive Director and three days after the O'Connor article appeared, Governor Sanford filed his Motion to Enjoin Dissemination. Aff. ¶ 26. The next day, September 15, the Deputy Director of the Commission sent a letter to Mr. Bowers stating that the motion was premature because the investigation is ongoing, no report has been completed, and the Governor would be provided with a copy of the report and "[a]t that time ... will have the opportunity to argue any and all motions related to this matter." Aff. ¶ 27; Petition, Exh. F. The Commission has not yet heard argument on this motion, and the Commission

staff will not release any report to the House of Representatives except as may be directed by the Commission following its consideration of and ruling on the Motion to Enjoin Dissemination. Aff. ¶ 28.

On Wednesday, September 16, 2009, an article entitled "*Sanford provides records for panel*" authored by Jim Davenport appeared in The State. Petition, Exh. D. In the article, Mr. Davenport reported that "Hayden and the House's leadership say the nature of impeachment in the state constitution gives the legislature prosecution powers" and that the Executive Director "said that could mean the documents are turned over when the House speaker tells a committee to begin an impeachment inquiry or when an impeachment resolution is introduced."

The Governor's Petition for Writ of Mandamus followed on September 30, 2009. On October 3, 2009, an article entitled "*Push for governor to resign growing*" authored by Leroy Chapman, Jr., appeared in The State. Exhibit B. Mr. Chapman reports Governor Sanford as saying that "impeachment talk is fueled by his political rivals," and the article further reports that Representative Todd Rutherford, "who serves on the Judiciary Committee that would vote first on an impeachment measure," said that is "[n]ot so," that "[o]nly four or five of the 25 members of the Judiciary Committee have been willing to say they support impeachment," and that "[w]e will await the facts and then act." A copy of this article is attached as Exhibit B.

Argument

I. Governor Sanford's alleged injury is not ripe.

Governor Sanford's petition is not ripe and should be dismissed because its claim of relief hinges upon events that have not occurred and may never occur. "A

justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Edwards v. State of South Carolina*, Order No. 2009-04-22-01 (April 22, 2009); *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) ("A 'court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all'") (quoting *Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc.*, 849 F.Supp. 1083, 1085-86 (D.S.C. 1991)). In short, "[t]his Court cannot issue an advisory opinion." *Edwards*, Order No. 2009-04-22-01.

A careful review of the facts and law shows that granting the Petition would constitute a prohibited advisory opinion because the following events have not yet occurred and must be completed before the Governor's alleged injury is ripe:

1. The investigation of Governor Sanford is ongoing and will not be completed before late October 2009. Aff. ¶¶ 14-15.
2. No report of any type has been prepared by Commission staff and none will be prepared until the investigation is completed. Aff. ¶ 16.
3. No report has been provided to the Commissioners for consideration and no report has been provided to Governor Sanford. Aff. ¶¶ 16-17.
4. The Commissioners have not heard argument or ruled upon Governor Sanford's Motion to Enjoin Dissemination. Aff. ¶¶ 27-28.
5. The House of Representatives has not yet initiated impeachment proceedings and the Commission staff will not provide it with a report until that occurs. Aff. ¶¶ 25, 29.

It will be at least a month before any report is prepared and presented to the Commission. It is possible that the House of Representatives will delay the initiation of impeachment proceedings before the regular session begins in January 2010, if at all. Even if the pending Motion to Enjoin Dissemination is denied, any number of things

could happen in the interim period that could render this issue moot or completely change the pertinent issues.

In short, there is much left to be resolved before the Governor has an issue ripe for review. Obviously, the investigation must be completed and a report prepared. But even after that happens, a Preliminary Report must be presented to the Commission, which then must meet and make a probable cause determination. A more detailed Investigative Report will be presented to the Governor's counsel and to the Attorney General,[1] but as the Deputy Director advised Governor Sanford's counsel, "[n]o report will be provided to anyone until such time as the Commission receives it from staff." Aff. ¶ 27. Until the report is prepared and issued, the Governor's allegations are only speculative and conjectural.

But even if all of these events happen, the injury for which the Governor seeks this Court's help still will not be ripe. Specifically, as Governor Sanford's counsel was advised, the Commission staff will not provide any report to any entity other than the Attorney General unless and until the Commission hears argument on and subsequently denies Governor Sanford's Motion to Enjoin Dissemination. *See* Aff. ¶¶ 22, 27-29. If this injunction motion is granted, the Commission of course will not of its own initiative release the report to the House of Representatives. *See* Aff. ¶¶ 28-29. But even if the

[1] The Ethics Act specifically provides for disclosure of the investigative report to the Attorney General. S.C. Code Ann. § 8-13-320(10)(h). Governor Sanford does not dispute that the Commission may release the report to the Attorney General. *See* Petition, pp.10-11; *see also* Motion to Enjoin Dissemination, p.6 (attached as Exhibit 6 to Hayden Aff., which is attached as Exhibit A to this memorandum) (contending that the Ethics Commission may not provide "any information about its internal investigation to anyone other than the Attorney General.").

injunction motion is denied by the Commission, Governor Sanford will have the opportunity to seek judicial review of that decision.[2]

Even assuming these preceding conditions occur with no other intervening events rendering the issue moot, the Commission still will not release the Investigative Report to the House of Representatives unless and until impeachment proceedings are initiated. Aff. ¶¶ 24-25, 29. The Commission has consistently stated its position this way to Governor Sanford. *See* Petition, Exh. F (letter from Deputy Director advising counsel that when he receives the report, he "will have the opportunity to argue any and all motions related to this matter."); *see also* Aff. ¶ 27. This position is entirely consistent with the statements attributed to the Executive Director and published in the news articles on which the Governor heavily relies. In "*Sanford provides records for panel,*" Jim Davenport writes that "Hayden and the House's leadership say the nature of impeachment in the state constitution gives the Legislature prosecution powers" and that "Hayden said that could mean the documents are turned over *when the House speaker tells a committee to begin an impeachment inquiry or when an impeachment resolution is introduced.*" Petition, Exh. D (emphasis added). In "*Sanford fears 'kangaroo court,'*" John O'Connor writes that "Hayden said that *once the House opens*

[2] As explained more fully below, the presence of this remedy before the Commission and through the normal appellate review process provides Governor Sanford with the protection he seeks and, thus, belies the need for the extraordinary writ of mandamus. Notably, as an alternative remedy, the Governor requests the Court to "issue an order directing the Ethics Commission to consider this issue immediately after the preliminary investigatory report is finalized and before it is publicly disseminated." Petition, p.15. He also requests that the Court direct the Commission "to hold that decision in abeyance" if it "is adverse to the Governor's position ... until this Court has an opportunity to re-examine this issue." *Id.* That, too, would be an advisory opinion. It also would be inconsistent with the usual procedure of review by the Court of Appeals. And it would be unnecessary because the Governor would have the usual appellate remedies available to him.

impeachment hearings, it becomes a prosecutorial body and can have access to Ethics Commission reports." Petition, Exh. E (emphasis added). And, according to Representative Todd Rutherford, the initiation of impeachment proceedings has not yet been determined. *See* Exh. B. If impeachment never is initiated, the Commission will not of its own initiative transmit the report to the House and the Governor's alleged injury will not have occurred. Thus, there is no action needed by this Court at this time to protect Governor Sanford from any harm alleged in the petition.

Finally, at least one more possibility must be borne in mind even if it is assumed that all of these other events ultimately occur. The arguments raised by the Governor regarding the Ethics Commission and its rules, regulations, and actions ultimately may become irrelevant because the House of Representatives may issue a subpoena *duces tecum* to the Ethics Commission for the information at issue. The legislature, of course, has broad subpoena powers and could exercise those powers to obtain information—such as any Commission report—for use in considering impeachment. *See Ex parte Parker*, 74 S.C. 466, 55 S.E. 122, 124 (1906) ("The power of the General Assembly to obtain information on any subject upon which it has power to legislate, with a view to its enlightenment and guidance, is so obviously essential to the performance of legislative functions that it has always been exercised without question."). If a subpoena is issued, either through the existing statutory procedures[3] or otherwise,[4] all of the issues articulated here will become irrelevant and moot because the question then will

[3] S.C. Code Ann. § 2-69-10 (granting standing committees the authority to issue subpoenas and subpoenas *duces tecum*).

[4] For example, if it decides to inquire into impeachment of the Governor, the House may adopt a resolution governing the impeachment process and, *inter alia*, establishing specific procedures for issuing subpoenas and subpoenas *duces tecum*.

be the breadth of the legislature's subpoena powers, not the Executive Director's statements or the Commission's authority or actions. *See also* S.C. Code Ann. § 2-69-70 ("A good faith reliance by the party subject to the subpoena *duces tecum*, issued pursuant to this chapter is a defense to any action, civil or criminal, arising from the production of records, documents, or other tangible materials in response to the subpoena."). That alone would render any opinion in this case advisory. Because ripeness requires consideration of whether predicted events will occur as anticipated and because a legislative subpoena represents one more possible—but not at all remote—occurrence in this already speculative case, the petition is not ripe and should be dismissed.

II. Pursuant to Rule 245(a), Governor Sanford is in the wrong court.

South Carolina Rule of Appellate Procedure 245(a) states that this Court will not entertain matters in its original jurisdiction if that matter can be determined by a lower court in the first instance. Governor Sanford has a Motion to Enjoin Dissemination that remains pending before the Ethics Commission. If ultimately warranted by the development of events, Governor Sanford will have his motion heard by the Ethics Commission and, if he receives an unfavorable decision, have the opportunity to seek judicial review. Therefore, the Governor has remedies available other than the issuance of a writ of mandamus by this Court, warranting dismissal of the petition pursuant to Rule 245(a).[5]

[5] In addition, Governor Sanford did not attach any supporting affidavit in compliance with Rule 245(a).

III. Governor Sanford really wants an injunction, not a writ of mandamus, which he must seek from another court.

A writ of mandamus is not the proper remedy in this case because Governor Sanford wants this Court not to require the Commission to do something, but rather prevent it from releasing any report to the House of Representatives. *See, e.g., Miller v. State*, 377 S.C. 99, 659 S.E.2d 492 (2008) ("Mandamus is the highest judicial writ and is issued ... only when there is ... a positive duty to be performed."); *State ex. Rel. Conant v. Fuller*, 18 S.C. 246 (1882); *see also* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining positive duty as a "duty that requires a person either to do some definite action or engage in a continued course of action"). Therefore, what he really wants is not a writ of mandamus, but an injunction. *Cf. North Carolina Public Service Co. v. Southern Power Co.*, 282 F. 837, 840 (4th Cir. 1922) ("Injunction is the proper remedy for threatened violation of a duty, entailing an injury for which the law gives no adequate compensation."). The Governor in fact already has characterized the relief he seeks as injunctive, filing with the Ethics Commission his Motion to ***Enjoin*** Dissemination of Investigative Report and all Other Materials Related to These Proceedings. Aff. ¶ 26 (emphasis added). His petition therefore seeks not a writ of mandamus ordering the Ethics Commission to take some ministerial action required by statute, but instead a writ of injunction ordering the Ethics Commission not to take some action. *See Greenwood County v. Shay*, 202 S.C. 16, 23 S.E.2d 825 (1943); *cf. Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) ("Although the petition in this case was styled as a request for a writ of mandamus, we find that based on the relief sought, the County's pleading is more properly characterized as a request for an injunction.").

Viewed in this light, Governor Sanford is in the wrong place and has another legal remedy elsewhere. Although this Court admittedly has an express grant of original power to issue an injunction, "[t]he Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties." S.C. R. App. Proc. 245(a). For the same reasons that this case is not ripe, there is no material prejudice to the parties from requiring Governor Sanford to seek injunctive relief from a lower court if his pending motion is denied by the Commission. Chief Justice Toal has stated that, "[b]ecause petitions for injunctive relief can easily be addressed to lower courts, it is highly improbable these days that the Supreme Court would be receptive to a petition for a writ of injunction in its original jurisdiction, except under the most extraordinary circumstances." JEAN H. TOAL ET.AL., APPELLATE PRACTICE IN SOUTH CAROLINA, p.273 (2nd ed. 2002). Given the unripeness of this case and the availability of remedies in the ordinary course of judicial process, those extraordinary circumstances do not exist here and the petition, in whatever form, should be dismissed.[6]

[6] The Ethics Commission contends that Governor Sanford is not entitled to an injunction in any event because he has available an adequate remedy at law through consideration and, if necessary, appellate review of his Motion to Enjoin Dissemination.

IV. Alternatively, Governor Sanford is not entitled to the writ he seeks.

Even assuming Governor Sanford may hurdle the bars of ripeness, Rule 245(a), and the proper relief sought, Governor Sanford is not entitled to the writ of mandamus he seeks from this Court because he does not meet the predicate elements for mandamus. To be afforded a writ of mandamus, Governor Sanford must show the following:

1. The Ethics Commission has a duty not to release a report to the House of Representatives.
2. The duty not to release the report is ministerial in nature.
3. He has a specific legal right for which performance of the duty is essential.
4. He has no other legal remedy.

Edwards v. State, 383 S.C. 82, 96, 678 S.E.2d 412, 420 (2009). Issuance of a writ of mandamus is exclusively within this Court's discretion. *In re Lyde*, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985); *see also Ehrlich v. Jennings*, 78 S.C. 269, 277, 58 S.E. 922, 926 (1907) ("[I]n the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act.").

The failure to satisfy any one of the predicate elements requires denial of the petition. *See In re Lyde*, 284 S.C. at 421, 327 S.E.2d at 71; *see also Stanton v. Town of Pawley's Island*, 309 S.C. 126, 129, 420 S.E.2d 502, 503 (1992). Therefore, it is appropriate here to consider first whether Governor Sanford has any other legal remedy, followed by the nature of the alleged duty, whether the alleged duty is ministerial, and whether he has a specific legal right for which performance of the duty is essential. A review of these principles reflects that mandamus is not warranted in these circumstances.

A. Governor Sanford has other legal remedies available to him.

"Where another adequate remedy exists, a writ of mandamus cannot rightfully be issued." *In re Lyde*, 284 S.C. at 422, 327 S.E.2d at 421. As referenced above, Governor Sanford has other legal remedies available to him. He may argue his pending Motion to Enjoin Dissemination to the Ethics Commission and, if that is decided against him, appeal that decision to the Court of Appeals and, if warranted, to this Court through the certiorari process. Therefore, mandamus is not warranted here because Governor Sanford has other legal remedies available through standard administrative procedures. *See, e.g., Steele v. Benjamin*, 362 S.C. 66, 72-73, 606 S.E.2d 499, 503 (Ct. App. 2004) (failure to exhaust administrative remedies requires denial of mandamus relief); *Bradley v. State Human Affairs Comm'n*, 293 S.C. 376, 380, 360 S.E.2d 537, 539 (Ct. App. 1987) ("[M]andamus will not lie when an available administrative remedy has not been pursued to its end.").

B. There is no positive duty related to releasing any report to the House of Representatives.

Properly understood, the requested act by the Governor is that he wants the Ethics Commission not to release to the House of Representatives any report related to its investigation of him. As discussed above, the Governor is not entitled to a writ of mandamus because he seeks not the enforcement of an affirmative duty for the Commission to act, but an injunction to stop the Commission from taking an act. *See* discussion *supra* Part III. But in any event, there is no duty imposed on the Commission staff regarding release of any report to the House of Representatives because, under Commission Regulation 52-718(C), the "requirements of confidentiality" do not apply to "[r]eferring or releasing information to another prosecuting authority." 24 S.C. Code

Ann. Regs. 52-718(C) (Supp. 2008). The Executive Director has determined that the House of Representatives would be "another prosecuting authority" if it begins impeachment proceedings. Consequently, there is no affirmative duty at issue in this case.

C. Withholding any report from the House of Representatives is not a ministerial or non-discretionary action susceptible to mandamus relief.

In light of Commission Regulation 52-718, the decision whether to release information to the House of Representatives is not ministerial in nature. "[A] duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008); *see also Edwards*, 383 S.C. at 96, 678 S.E.2d at 420 (defining Governor's duty to apply for SFS funds as ministerial because it was "a simple, definite duty arising under the conditions specified in the ARRA [that left] nothing to Governor Sanford's discretion"). The duty alleged by Governor Sanford in this case is not ministerial if for no other reason than the Ethics Act and related regulations contain no affirmative ministerial or non-discretionary command expressly stating that the Ethics Commission will not release information to the House of Representatives.

Governor Sanford brings this petition in reliance on his acknowledged right to confidentiality under the Ethics Act. But Commission Regulation 52-718(C) defines and interprets that term, and states in pertinent part that the "requirements of confidentiality" do not apply to "[r]eferring or releasing information to another prosecuting authority." Commission staff interprets "another prosecuting agency" to include the House of Representatives if it initiates impeachment proceedings. Governor

Sanford disputes this interpretation, but as an interpretation of what the Commission may or may not be allowed to do, the challenged action cannot be a ministerial act which the Commission must perform. Therefore, Governor Sanford's claimed relief it is not susceptible to resolution through mandamus proceedings.

Moreover, Governor Sanford's very challenge to the Commission's interpretation of Regulation 52-718(C) is sufficient to defeat a request for a writ of mandamus. "'The use of the writ of mandamus is limited to the enforcement of a merely ministerial duty and to the protection of a plain, admitted, and unquestioned legal right that has been arbitrarily or without due warrant of law denied.'" *Parker v. Brown,* 195 S.C. 35, 10 S.E.2d 625, 634 (1940) (quoting *Gardner v. Blackwell, Secretary of State,* 167 S.C. 313, 320, 166 S.E. 338, 340 (1932)). Mandamus "only issues when there is a specific legal right" and "[w]hen the legal right is doubtful..., the writ of mandamus cannot rightfully issue." *State v. Appleby*, 25 S.C. 100, 102 (1886). As is clear from his Petition, Governor Sanford disputes the Commission's interpretation as to whether the House of Representatives may properly be considered a "prosecuting authority" in the context of Regulation 52-718(C) and, therefore, be provided a copy of the investigative report. Because the Commission's rights and duties in this respect have been called into doubt, Governor Sanford has not clearly established that he has the right to relief by mandate and the writ should, therefore, not issue.

Of course, the Ethics Commission itself should be permitted to interpret its own regulations in the first instance. *See South Carolina Coastal Conservation League v. South Carolina Dep't Health & Envir. Ctrl.*, 363 S.C. 67, 610 S.E.2d 482 (2005); *see also Neal v. Brown*, __ S.C. ___, ___ S.E.2d ___, 2009 WL 2598097, *3 (2009)

(holding that "an agency's Appellate Panel, not its staff, is typically entitled to deference in interpreting agency regulations"). The Commission can render that interpretation through hearing arguments and ruling on Governor Sanford's pending Motion to Enjoin Dissemination. And that determination then can be appealed to and reviewed by the Court of Appeals and, if warranted and deemed appropriate, by this Court.

Suffice it to say here, though, that the Commission staff's interpretation of the regulation at issue is reasonable. The phrase in question is "another prosecuting authority." Governor Sanford argues that the phrase must be limited to the Attorney General. However, the word "another" taken in context must mean a prosecutorial entity similar to the Ethics Commission. The Ethics Commission is a state entity charged with, among other things, investigating violations of the Ethics Act, Aff. ¶ 3, but it clearly does not have the authority to affirmatively prosecute criminal proceedings in court. *See* S.C. Code Ann. § 8-13-320(8) (authorizing Commission to request the Attorney General to "prosecute ... a criminal action for the purpose of enforcing the provisions of this chapter"). Therefore, "another prosecuting authority" necessarily includes an entity like the Ethics Commission that is charged with investigating violations of state constitutional, statutory, or regulatory proceedings.

Viewed in this context, the term "another prosecuting authority" includes the House of Representatives because that body is charged with investigating and, if determined appropriate, initiating impeachment proceedings. S.C. Const., art. XV § 1. Contrary to the Governor's argument, the phrase "prosecuting" does not automatically exclude the House of Representatives when it is discharging its impeachment powers.

For example, in discussing impeachment in "A Familiar Exposition of the Constitution of the United States," Justice Story stated that "[a]dditional articles may be exhibited, perhaps, at any stage of the *prosecution*." JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, Ch. XI, § 128, p.110 (1840) (reprint by Regnery Gateway, Inc., 1986) (emphasis added). Other states broadly characterize their House of Representatives' role in impeachment as prosecution.[7] Regardless, at this stage, it is not necessary or even appropriate for this Court to determine the correctness of this analysis. Rather, the interpretative process necessary to determine whether an Impeaching House of Representatives is "another prosecuting authority" will not occur until after impeachment proceedings begin, which shows that there is no ministerial or non-discretionary duty present in this case.

D. Governor Sanford has no specific legal right to keeping any investigative report from the House of Representatives.

Governor Sanford certainly has a right to confidentiality under the Ethics Act and the related regulations. But the issue here is whether the right to confidentiality incorporates a right against disclosure of any Investigative Report to the House of

[7] *E.g,* Ariz. Rev. Stat. § 38-312 ("Impeachment shall be instituted in the house of representatives by resolution, and shall be conducted by managers elected by the house of representatives, who shall prepare articles of impeachment, present them at the bar of the senate and prosecute them."); Ark. Code Ann. § 21-12-201 (defining "Impeachment" as the "prosecution, by the House of Representatives before the Senate, of the Governor or other civil officer for misdemeanor in office"); Cal. Gov. Code § 3022 ("The managers shall prepare articles of impeachment, present them at the bar of the Senate, and prosecute them."); Ky. Rev. Stat. Ann. § 63.040(a) ("If an impeachment is ordered by the House of Representatives a committee shall be appointed to prosecute it, and the committee chairman shall, within five (5) days, lay the impeachment before the Senate."); Rule 3(a), Senate Impeachment Rules of the 96th General Assembly solely for impeachment trial proceedings, 2009 Illinois Senate Res. 00006 (found at http://www.ilga.gov/legislation/96/SR/PDF/09600SR0006lv.pdf) ("The Counsel to the Special Investigative Committee of the House shall be the House Prosecutor.").

Representatives after it has initiated impeachment proceedings. In this instance, Governor Sanford has no specific legal right to keep the Ethics Commission from releasing the report to the House of Representatives based on Commission Regulation 52-718(C). That right further is limited by Commission Regulation 52-718(F), which states that the Commission's internal and investigatory papers shall not be made part of the public record that the Commission prepares after the final disposition of a matter. In other words, under the terms of the regulation, although the Commission's public record will not include its internal investigative report, the Commission may provide that information to "another prosecuting authority." Therefore, Governor Sanford has no specific legal right applicable in this instance and the Petition should be dismissed.

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Conclusion

In conclusion, Governor Sanford's alleged injury is not ripe at this juncture. Rule 245(a) further requires that Governor Sanford exhaust his administrative remedies through review of his pending Motion to Enjoin Dissemination, which he has not yet done. Governor Sanford actually seeks injunctive relief and is required to pursue that remedy elsewhere. And, alternatively, Governor Sanford fails to meet the requirements for mandamus relief because there is no affirmative ministerial duty applicable in this case. For these reasons, Governor Sanford's Petition for Writ of Mandamus should be dismissed.

Respectfully submitted,

Cathy L. Hazelwood

Cathy L. Hazelwood by AR7 with express consent
Deputy Director and General Counsel
South Carolina State Ethics Commission

Columbia, South Carolina
October 5, 2009